Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2012

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information held by the Home Office (HO) following his arrest by the Metropolitan Police Service (MPS) and his application for the destruction of the DNA samples that were taken from him by MPS at the time of his arrest, along with the total destruction of all relevant records of the DNA samples, and connected proceedings. The Information Commissioner's decision is that HO has not complied with section 1(1) FOIA in that it wrongly relied on section 14(1) FOIA when responding to the complainant's information request. HO had also breached section 17(5) FOIA by not providing the complainant with a refusal notice within the time set out in section 10(1) of that Act. The Information Commissioner requires HO to take the following steps to ensure compliance with the legislation. HO must either disclose the information requested or issue a refusal notice complying with section 17(1) FOIA.

2. HO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Information Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

3. In September 2008 the complainant was arrested by MPS but MPS subsequently took no further action against him. Following his arrest, the complainant provided samples of his DNA and fingerprints. The complainant later issued proceedings against MPS for wrongful arrest and requested that his DNA, fingerprints and Police National Computer (PNC) record be deleted under the exceptional case procedure.

4. Following court proceedings, the complainant was awarded damages and costs for wrongful arrest. He was told that his police record and DNA samples had been deleted. However, his suspicions were later aroused and he was concerned (correctly) that his DNA record had not in fact been completely destroyed. He contacted MPS asking for further proof of erasure. He has since continued to seek confirmation from HO, MPS and other public authorities about their systems and procedures for the deletion of the DNA samples and records of people who have been arrested but later released without charge. The complainant remains concerned that complete erasure of his own DNA records, and those of other persons in a similar position to himself, has still not been achieved; he seeks action and reassurance.

5. Since 2005, the Forensic Science Service (FSS) has been a Government-owned, HO controlled, company providing forensic science services to the UK criminal justice system. On 14 December 2010 the Government announced that FSS would close. FSS work is being transferred to alternative providers and the company expects to cease operations by 31 March 2012.

6. The complainant told the Information Commissioner that FSS had confirmed to him, and also to the Information Commissioner and others, that his DNA data had been deleted. However, FSS had then confirmed, in May 2010 and again in June 2011 that in fact it still retained relevant data. There have been connected court proceedings and in October 2011 FSS issued an apology and paid the complainant a sum of money in respect of its failure to delete his DNA records from its systems. The continuing retention of his DNA records, despite assurances that they had been deleted, came to light as a result of the proceedings against FSS.

7. The complainant told the Information Commissioner that there was evidence of his more general concern about the DNA records of innocent people being retained on relevant systems after they are supposed to have been deleted and after assurances have been given to that effect. He added, in November 2011, that he still had live proceedings before the courts in relation to the handling by MPS of his DNA record and related data.

Request and response

8. On 22 June 2011, following earlier correspondence with HO about his concerns over the FSS evidence to the House of Commons Committee on the Protection of Freedoms Bill, the complainant requested information from HO in the following terms:

> *"Please supply a copy of any and all documents between parties within [HO] and between [HO] and any third party (be that individual or organisation that are in your possession or under your control related to or dealing with my unlawful arrest by the MPS, my seeking to secure the destruction of my DNA by the FSS [Forensic Science Service] and my court proceedings against both the MPS and the FSS related to these matters."*

9. HO did not identify the information request until 13 July 2011 and responded on 4 August 2011. HO said that it had decided that the request was vexatious and that, in accordance with section 14(1) FOIA, it was not obliged to comply with it.

10. Following an internal review, HO wrote again to the complainant on 9 September 2011. HO said that, despite detailed searches, it had found no evidence of the 22 June 2011 letter having been received by HO before 13 July 2011 and that its' refusal notice of 4 August 2011 had therefore complied with section 10(1) FOIA which requires a response within 20 working days.

11. On the substantive matter, HO maintained its refusal of the request relying on section 14(1) FOIA and saying that the complainant had engaged in extensive correspondence with it since 2010 about the retention of his DNA samples and records by FSS. HO said that this correspondence had been dealt with outside of FOIA. The complainant had also, HO said, submitted a series of FOIA requests to other public bodies on connected matters.

12. On 12 October 2011 the complainant told HO that it had failed to address the core issue of his FOI request. He said that his follow-up letters to which HO referred were a direct result of HO's failure to address the content of his request. He added that it was disingenuous and wrong for HO to focus on the number of letters from him and said that HO had sought to amalgamate unconnected matters in letters from him to seek to justify its failure to address the core issue of his FOI request.

Scope of the case

13. The Information Commissioner has considered the application by HO of the section 14(1) FOIA exemption.

14. Parts of the request relate to data of which the complainant is the subject. The Information Commissioner's normal approach where a public authority has deemed a subject access request to be vexatious under FOIA is to refer the subject access request itself for an assessment under the Data Protection Act 1998 rather than considering whether it is vexatious under section 14 FOIA. However, when considering whether an FOIA request is vexatious, the Information Commissioner may take into account the overall context including any relevant subject access requests. The complainant has made, and HO have addressed, a separate but connected subject access request. Therefore, the Information Commissioner has followed the approach used by HO itself and addressed the section 14(1) FOI matter.

Information Commissioner's investigation

15. On 19 October 2011 the complainant contacted the Information Commissioner to complain about the way HO had handled his request for information. He said that HO's internal review contained information about him that was inaccurate, eg that charges had been laid when they had not. He said he had requested the relevant documents so that the full extent of the errors could be identified and rectified. He added that the reasoning used to justify the refusal had suggested that he had sent HO an excessive number of letters. This was wrong as HO had sought to conflate and amalgamate letters on dissimilar matters, such as the Protection of Freedoms Bill, had counted 'chaser' letters when his letters had been ignored, and had wrongly counted letters asking for clarification. In reality, many of the letters cited by HO in its internal review were totally unrelated to the FOIA request and some had not even been sent to HO itself. He said that if HO had replied promptly with full and accurate responses many of his letters would have been unnecessary. The FOIA request was rooted in a desire to see and correct wrong and potentially damaging information held about him.

16. HO had told the complainant that it had not received his 22 June letter until 13 July 2011. The Information Commissioner saw evidence that a HO fax machine (contacted through the number previously given to the complainant by an officer of HO) had automatically acknowledged receipt of this letter at 10.20:15 hrs on 22 June 2011. The Information Commissioner's staff noted a later internal HO email exchange in which an HO official acknowledged that the 22 June 2011 request had been "*overlooked*". The Information Commissioner found as a fact, on a

balance of probabilities, that HO did receive the faxed information request on 22 June 2011.

17. On 6 July 2011 the Association of Chief Police Officers (ACPO) issued a national advice note (the ACPO advice) regarding information requests by the complainant and which he has now seen. The ACPO advice was that relevant bodies receiving requests from the complainant should issue a section 14(1) notice deeming any request from him, and any future requests, to be vexatious on the grounds that they: imposed a significant burden, were designed to cause disruption, and were obsessive and manifestly unreasonable. ACPO's advice to recipients was to apply this approach to any requests from the complainant regarding forensics, including those about suppliers of forensic science services, and in particularly those about DNA deletions. The ACPO advice said that the complainant's actions could *"be likened to the characteristics displayed as part of the condition of 'querulous paranoia'"*. The ACPO advice concluded that lack of corporacy was a major risk to the police service and asked for *"the opportunity to discuss with members any decision to not follow its advice"*.

18. On 17 November 2011 the complainant told the Information Commissioner that he had sought data from the Home Office on its interaction with, and knowledge of, his complaint against FSS. During these exchanges HO provided him with extracts of documents that contained, he said, incorrect information about him, but HO had then refused to provide all of the relevant material. After lengthy exchanges HO had amalgamated his letters on this issue with other correspondence about exceptional case deletions and the Protection of Freedoms Bill, along with his letters to his MP and Ministers and had, he said, deemed his request vexatious and refused to have any more contact with him on the matter.

19. Also on 17 November 2011 the complainant told the Information Commissioner that he was far from paranoid. He said that all he had sought from the authorities, as a wholly innocent person, was the deletion of his unlawfully held data and records. His concerns about lax handling of sensitive records had been proved right. He said that his data was still being unlawfully held even though he had been misled into believing that it had been deleted. He said that obtaining and uncovering the truth did not make him paranoid, it vindicated his position.

20. Turning to the ACPO advice of 6 July 2011 the complainant said that a lot of the information in that document, and in other ACPO documents about him, was personal data, some of it wrong, and sought to frustrate his FOIA requests, particularly those relating to the wrongful retention of DNA data. He said that ACPO had obtained, and distributed to other

public authorities, information about requests he had made not just to police forces but also to other public bodies. He said that ACPO had referenced his court proceedings against FSS and MPS and in doing so "*tampers with the possible collection of evidence for those proceedings*".

21. During his own investigation the Information Commissioner noted that HO on 22 July 2011 had been seeking "*To build a case for citing section 14(1)…*". He has also seen evidence from the complainant that HO officials confused his correspondence with other correspondence which had been sent to it by someone who was manifestly another enquirer with the same name on unrelated matters and dating from the early part of 2010. HO had decided that this unrelated correspondence should be '*Doomsdayed'* as vexatious. Some of this unrelated correspondence had been disclosed to the complainant in error by HO. The complainant considered that this confusion within HO made officials more inclined to regard his own correspondence with them to be vexatious.

22. On 6 January 2012 HO told the Information Commissioner that it still stood by the reasoning in its internal review of 9 September 2011 and its then conclusion that the request was vexatious. HO acknowledged that the request was a single freedom of information request and not one of a series of repeated or similar requests. For the reasons considered in the internal review, HO nevertheless considered that the request, taken together with the previous correspondence out of which it emerged, met the criteria for being treated as vexatious. HO said that it also acknowledged, to an extent, the complainant's point that a number of his letters were progress chasing. It did not, however, agree that this would cover the majority of the correspondence listed in the internal review or that it altered the conclusions of that review.

23. HO added that if the Information Commissioner were to decide that the request was not vexatious then, in the alternative, it would argue that the information requested on 22 June 2011 is exempt under section 40(1) FOIA as it constitutes the complainant's personal data which he has now received following a separate request under the Data Protection Act 1998.

Reasons for decision

Vexatious – s14(1) FOIA

24. The Information Commissioner has seen that the request was not a repeated request but was set within the context of a series of letters to HO, some other public authorities and other parties on connected matters. There have, too, been two sets of court proceedings on connected matters.

25. Section 14(1) FOIA states that:

> *"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."*

26. Under section 14(1), a public authority does not have to comply with a request for information if the request is vexatious; there is no public interest test. The term "vexatious" is not defined in the Act. The Information Commissioner notes, however, that it is the request rather than the requestor which must be vexatious.

27. In determining whether or not the request is vexatious, the Information Commissioner had regard for the context and history of the request and assessed how far the request fell into some or all of the following criteria. Not all of the criteria may be relevant to a request; however, where the request falls under only one or two of the categories, or where the arguments sit within a number of categories but are relatively weak, the Information Commissioner may give less weight to a claim that section 14 is engaged. The key criteria when determining if a request is vexatious, are that the request:

    a) would impose a significant burden on the public authority in terms of expense or distraction;

    b) clearly does not have any serious purpose or value;

    c) is designed to cause disruption or annoyance;

    d) has the effect of harassing the public authority;

    e) can fairly be characterised as obsessive or manifestly unreasonable.

28. HO said that criteria b) and d) did not apply in this matter and the Information Commissioner so decided. Turning to the other criteria the Information Commissioner's analysis is as follows.

a. would impose a significant burden on the public authority in terms of expense or distraction

29. HO said that it did not believe that the request had caused distress or harassment to HO staff but did constitute a significant burden in terms of costs and diversion of staff from core functions. HO said that between 17 June 2010 and 13 July 2011 the complainant had sent to it 28 letters of correspondence and one FOIA request regarding DNA record retention and destruction by FSS. HO, to its credit, acknowledged that a number of the letters from the complainant were progress chasing and that

some of those had been justified. An example of that was the initial oversight by HO of the complainant's 22 June 2011 letter.

30. There have been connected proceedings and correspondence with other public authorities.

31. In reaching his decision the Information Commissioner took into account, in so far as he was aware of them, the pattern of requests to HO and other public authorities, and their cumulative effect. However he saw evidence in connected correspondence that not all public authorities fully shared the complainant's concern to end the improper retention of relevant DNA samples and records. He noted too that there was evidence of cooperation among several public authorities, including HO, to provide coherent and coordinated decisions and responses to the complainant's information requests.

32. The Information Commissioner was satisfied from the evidence provided by HO that responding to the complainant on this matter was proving to be a burden for HO and perhaps some other public authorities and he had regard for that in reaching his decision. However, he has also found that part of the burden on HO resulted from its own shortcomings.

33. The Information Commissioner noted that the Tribunal in *Voges (EA/2011/0076 at paragraphs 41, 45)* has indicated that there may be circumstances in which a request which has a serious and proper purpose may be deemed not to be vexatious despite placing a significant burden on a public authority.

34. In this matter the Information Commissioner found that the serious purpose of establishing whether or not DNA samples and records were being retained improperly by a public authority or a contractor, whether in the complainant's individual case or systemically, was a sufficiently serious purpose to justify HO dealing fully with the matter despite its placing a significant burden on itself and others.

c. request is designed to cause disruption or annoyance

35. HO accepted that the request did not lack serious purpose or value and that the complainant's correspondence was not initially intended to cause disruption to HO. However, HO said that over time his position had hardened and the overall tone had become pejorative and antagonistic as he sought to progress his campaign to amend the grounds on which DNA records are retained by FSS. HO concluded that the request was intended to cause disruption if not annoyance, a conclusion that accords with the ACPO advice.

36. The Information Commissioner considers that, for section 14 FOIA to apply, any distress or annoyance must be caused by the process of

complying with a request and not by the possible consequences of disclosure. In this matter he did not see evidence of intent on the part of the complainant to disrupt or annoy, beyond tenacity in seeking to establish the relevant facts.

e. the request can otherwise fairly be characterised as obsessive or manifestly unreasonable.

37. HO said that there was compelling evidence that the request was obsessive and fixed upon a single issue, the alleged improper retention of DNA records and samples by FSS; he seemed concerned to advance and seek redress for his concerns about that issue. To the extent that his information request of 22 June 2011 was a continuation of correspondence with HO from June 2010, a correspondence which sought to effect a change in the manner or grounds by which FSS might be entitled to retain the DNA of individuals generally, his request might be characterised as a campaign to elicit public comment by HO and other public authorities endorsing the validity of his concerns, and therefore be considered to be obsessive.

38. The Information Commissioner recognises that at times there is a thin line between obsession and persistence and although each case is determined on its own facts, the Information Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue.

39. The Information Commissioner has seen that, in his correspondence relating to this request with ministers, his MP and with HO officials, the complainant was drawing attention to evidence he believed he had assembled of the systematic and improper retention of DNA samples and records by public authorities or their contractors, that had been properly obtained from himself and other people by police authorities during enquiries, but had been wrongly retained when the subjects had not subsequently been charged with any criminal offences. He offered this evidence to HO and others, for example in connection with the Protections of Freedoms Bill. The Information Commissioner has decided that the request had serious purpose and value.

40. HO argued that the complainant was conducting a campaign to influence its policy with regard to the retention or deletion of DNA samples and records. The Information Commissioner has had regard to the decision of the Tribunal in the case of *Burke (Burke v Information Commissioner & One North East EA/2011/0179)* where the Tribunal found that a series of 149 requests could fairly be seen as a campaign against a grant decision and that "*a campaign will not be vexatious if it exposes improper or illegal behaviour but if it is not well founded or stands no*

reasonable prospect of success it can correctly be assessed as vexatious" (para 26). In this matter the Information Commissioner accepts that the complainant's campaign, if that is what if was, was well founded in the light of the outcome of the proceedings successfully instituted by the complainant and the fact that some of the assurances he had received in the past regarding the deletion of his DNA samples and records – which is what he is primarily seeking to achieve - had proved not to be well founded.

41. In summary therefore, the Information Commissioner has decided that, while the complaint had placed some significant burden on HO, the seriousness of its purpose meant that HO was not justified in regarding this single request as vexatious for that reason alone. He did not find that the request was designed to cause disruption or annoyance. He decided that this request, and other relevant related requests, had been pursued with vigour but that the seriousness of its purpose meant that it could not properly be characterised as manifestly unreasonable or obsessive.

Next steps

42. In order for it to comply with the legislation, the Information Commissioner requires HO to disclose the information requested or issue a valid refusal notice complying with section 17(1) FOIA.

Other matters

43. The oversight by HO of the complainant's 22 June 2011 information request led to HO not responding to it within the timescale required by section 10(1) FOIA, which therefore led to the late issue of HO's refusal notice in breach of section 17(5) FOIA.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ……

Jon Manners
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